

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 179

Docket No. DA-3443-06-0531-M-1

**Eloy J. Hernandez,
Appellant,**

v.

**Department of Defense,
Agency.**

September 3, 2009

Eloy J. Hernandez, San Antonio, Texas, pro se.

Michael Walby, Esquire, Battle Creek, Michigan, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This compliance matter is before the Board after remand from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which reversed and remanded our decision denying the appellant's petition for enforcement of a settlement agreement. For the reasons set forth below, we REMAND the matter to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 Effective June 30, 2006, the agency separated the appellant from his Material Handling Equipment Operator position during a reduction in force (RIF).

Initial Appeal File (IAF), Tab 1 at 2, Tab 6, Ex. 5. Because the appellant had been reprimanded, the agency found him ineligible for the Priority Placement Program (PPP). IAF, Tab 6, Ex. 2, 3. The appellant filed an appeal of his RIF separation. IAF, Tab 1. While the appeal was pending, the parties entered into a settlement agreement in which they agreed that, in exchange for the appellant withdrawing his appeal, the agency would --

- a. Remove the Decision of Reprimand from the appellant's Official Personnel Folder (OPF) dated 30 June 2006.
- b. Because of the removal of the Decision of Reprimand, the appellant is now eligible to be re-considered for registration in the D[O]D Priority Placement Program (PPP) by DHRC-N as a Priority 1 through operation of Para. SC1800.3.9 of DOD Instruction 1400.25-M, which states: "This limitation remains in effect until and unless the employee's performance or conduct is determined to be fully satisfactory."
- c. The appellant will be re-considered for placement in the PPP for a period of one year beginning 7 calendar days after the last signature on this Agreement. One year is the regulatorily-prescribed term of enrollment per Para. SC1800.3.7 of DOD Instruction 1400.25-M.

IAF, Tab 32 at 1-2. The last signature was placed on the settlement agreement on February 17, 2007. *Id.* at 2. The administrative judge then accepted the agreement into the record for enforcement purposes and dismissed the appeal as settled. IAF, Tab 33 at 1-2.

¶3 The appellant subsequently filed a petition for enforcement in which he asserted that the agency was required to keep him in the PPP and pay him severance pay through February 17, 2008, pursuant to the settlement agreement and the Displaced Employee Guide. Compliance File (CF), Tab 1 at 2. The agency responded that it paid the appellant all of the severance to which he was entitled and that the settlement agreement contained no provision extending his severance pay. CF, Tab 3 at 7-9, 12. The agency further contended that it reconsidered the appellant for inclusion in the PPP and requested that the Department of Defense (DOD) Civilian Assistance & Re-Employment (CARE)

Division register the appellant in the PPP for 1 year beginning on February 20, 2007. *Id.*, at 6-7, 11-12. However, it claimed that the DOD CARE Division advised that it was not possible to extend the appellant's PPP registration beyond 12 months after his separation. *Id.* The agency then requested the DOD CARE Division to examine all "relevant" vacancies from the appellant's separation date, June 30, 2006, to February 20, 2007, to see if the appellant missed consideration for any positions because he was not in the PPP during that period. *Id.* The DOD CARE Division informed the agency that the appellant did not qualify for any vacancies during that time. *Id.* The agency ended the appellant's PPP registration on July 2, 2007. *Id.* at 7. The appellant responded that the agency had failed to establish that it gave him proper consideration for vacancies between June 30, 2006, and February 20, 2007. CF, Tab 4 at 1-3.

¶4 The administrative judge denied the petition for enforcement, finding that the settlement agreement contained no provision requiring the agency to continue the appellant's severance pay in excess of amounts provided by law. CF, Tab 5 at 5-6. She further concluded that the agency complied with the settlement agreement by registering the appellant in the PPP effective February 20, 2007, and reviewing all the relevant vacancies from June 30, 2006, to February 20, 2007, to determine whether the appellant missed consideration for any of those vacancies. *Id.* The appellant filed a petition for review of that decision, PFR File, Tab 1, but the Board denied the petition by final order, PFR File, Tab 3.

¶5 The appellant sought review of the Board's decision by the Federal Circuit. In a nonprecedential decision, the Federal Circuit construed the settlement agreement as requiring the agency to enroll the appellant in the PPP for 12 months after the effective date of the settlement agreement and held that the agency's failure to do so constituted a breach of the settlement agreement. *Hernandez v. Department of Defense*, 325 F. App'x 905 (Fed. Cir. 2009). The Federal Circuit remanded the appeal to the Board to determine an appropriate remedy for the breach. *Id.*

ANALYSIS

¶6 We note that the Federal Circuit did not make an explicit finding as to whether the agency's breach of the settlement agreement was material. A material breach relates to a matter of vital importance or goes to the essence of the contract. *Thomas v. Department of Housing & Urban Development*, [124 F.3d 1439](#), 1442 (Fed. Cir. 1997); *Wells v. Department of the Treasury*, [89 M.S.P.R. 228](#), ¶ 18 (2001). We find that the agency's obligation to enroll the appellant in the PPP for 12 months after the effective date of the settlement agreement was a matter of vital importance to the contract, and we therefore conclude that the agency committed a material breach.

¶7 When one party commits a material breach of a settlement agreement, the other party is entitled to either enforce the settlement agreement or to rescind it and to reinstate his or her appeal. *Mullins v. Department of the Air Force*, [79 M.S.P.R. 206](#), ¶ 12 (1998). Although it appears that the appellant has been seeking enforcement of the settlement agreement rather than rescission, *see* CF, Tab 4 at 3, he should have the opportunity to reconsider that choice.

¶8 We note that this does not appear to be a case in which enforcement of the agreement would be impossible or ineffective. *See Diehl v. U.S. Postal Service*, [82 M.S.P.R. 620](#), ¶ 14 (1999) (where the agency had paid the appellant all of the money he was due under the settlement agreement and the agency's breach of a nondisclosure provision had already occurred, an order of enforcement would not have been an effective remedy). It appears that the agency could retroactively enroll the appellant in the PPP for the period between July 3, 2007, the day after the agency cancelled the appellant's enrollment, and February 24, 2008, exactly 1 year and 7 days after the last signature on the settlement agreement. The agency has already taken essentially the same action for the period between February 20 and July 2, 2007, CF, Tab 3 at 6-7, 11-12, and the agency conceded at oral argument before the Federal Circuit that it could have enrolled the appellant in

the PPP for a period extending beyond 1 year after his separation, *see Hernandez*, 325 F. App'x at 907.

¶9 If the agreement is rescinded, the settlement terms become inoperative. *Mullins*, [79 M.S.P.R. 206](#), ¶ 13; *Stipp v. Department of the Army*, [64 M.S.P.R. 124](#), 127 n.1 (1994), *overruled in part on other grounds*, *Wisdom v. Department of Defense*, [78 M.S.P.R. 652](#) (1998). The appellant would thus risk losing any benefits he has received under the agreement. Accordingly, on remand, the appellant must be permitted to make an informed choice between rescinding and enforcing the agreement. *See Mullins*, [79 M.S.P.R. 206](#), ¶ 13. If the appellant chooses to rescind the agreement, then the RIF separation appeal must be adjudicated.

ORDER

¶10 Accordingly, we REMAND this matter to the Dallas Regional Office. On remand, the administrative judge should give the appellant the option to (1) rescind the settlement agreement and proceed with the appeal challenging his RIF separation or (2) enforce the agreement. *See Diehl*, [82 M.S.P.R. 620](#), ¶ 15.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.